

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA DESLOOVER,

Plaintiff-Appellant,

v

RYAN'S STEAK HOUSE,

Defendant-Appellee.

UNPUBLISHED

November 22, 2005

No. 255660

Wayne Circuit Court

LC No. 03-322550-NO

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this case involving a slip and fall accident, plaintiff appeals by right an order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's fall occurred at approximately 6:00 p.m. on January 4, 2003. According to plaintiff, the accumulation of ice was due to an "inexplicably poor roof system with lack of gutters, which caused roof water to unnaturally fall onto the pedestrian sidewalks" and to accumulate. On the evening of the accident, plaintiff stepped from the parking lot onto the sidewalk and fell on the ice. Plaintiff maintained that she did not see the ice before she fell, but that she saw it after she fell. Plaintiff also stated that the parking lot was fairly well lit; however, she also stated that it was "fairly dark" in the area where she fell. She stated that she had watched where she was walking because she was walking in an area where people park and because she knew that it had snowed. Among other deposition testimony presented by the parties, various witnesses presented their observations as to whether the ice could be easily seen. Photographs of the area were also presented, including some taken immediately after the fall. Plaintiff presented expert testimony that the roof and sidewalk conditions presented an unreasonable risk of harm because they did not comply with the BOCA building code.

Plaintiff filed suit alleging negligence. The trial court granted defendant's motion for summary disposition, finding that the dangerous condition involved was open and obvious so as to prevent recovery. Plaintiff argues that the slippery condition was not open and obvious, and that even if the condition was open and obvious, it presented "special aspects" that rendered it "unreasonably dangerous" in spite of its open and obvious nature. We disagree.

We review a trial court's decision to grant or deny summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The parties and the trial

court relied on matters outside the pleadings; thus, review under MCR 2.116(C)(10) is appropriate. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo, supra* at 517-518.

Both the open and obvious danger doctrine and the principles concerning special aspects are equally applicable to cases involving the accumulation of snow and ice. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7-8; 649 NW2d 392 (2002). Whether a condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

While all accumulations of snow and ice may not be open and obvious, Michigan courts have generally held that the hazards presented by unobstructed ice and snow were open and obvious when the plaintiff knew or had reason to know of the slippery conditions. See *Perkoviq v Delcor Homes-Lakeshore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002); *Joyce v Rubin*, 249 Mich App 231, 240; 642 NW2d 360 (2002). Here, plaintiff admitted that she knew of the slippery conditions presented by the weather at the time she fell. Various witnesses testified that they did not see the ice when they approached plaintiff after she fell; however, they also testified that they were not paying attention to the ice at that time. Instead, they understandably focused their attention on plaintiff. These witnesses further testified that they could see the icy condition when they tried to observe it. The photographs taken immediately after the accident further support defendant's position. We find the trial court correctly ruled that reasonable minds could not differ that the slippery condition of the sidewalk was open and obvious. *Novotney, supra*.

We further agree with defendant that the slippery conditions presented no "special aspects" that created "a uniquely high likelihood of harm or severity of harm. . . ." *Lugo, supra* at 518-519. This Court has previously held that a layer of snow on a sidewalk did not constitute a unique danger creating a "risk of death or severe injury," *Joyce, supra* at 243. This Court has also held that falling down ice-coated stairs does not pose the risk of severe harm such as that contemplated in *Lugo, supra*. *Corey, supra* at 6-7. Ice on a sidewalk in Michigan in January is a common occurrence, not a unique one.

Furthermore, we reject plaintiff's argument that the condition was effectively unavoidable. Despite her skillful arguments to the contrary, the photographs presented into evidence show that plaintiff was not effectively forced to enter defendant's premises without any

option but to encounter the danger. She could have instead chosen to walk on the parking lot and enter the area of the sidewalk in front of the restaurant entrance.

Finally, we reject plaintiff's contention that the open and obvious doctrine does not apply, because she presented expert testimony that the conditions on the premises violated the BOCA building code. Plaintiff bases this argument on this Court's decision in *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003), and the holding in *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002) that "the open and obvious doctrine cannot be used to avoid a specific statutory duty." However, this Court has consistently held that building code violations are insufficient to impose a legal duty of care on an invitor. *O'Donnell, supra* at 578-579; *Summers v Detroit*, 206 Mich App 46, 51-52; 520 NW2d 356 (1994). Although a building code violation may be some evidence of negligence, it is insufficient to impose a legal duty cognizable in negligence. *Id.* See also *Corey, supra* at 9 n 1; *Ward v Frank's Nursery & Crafts, Inc.*, 186 Mich App 120, 135; 463 NW2d 442 (1990).

The dangerous condition here was open and obvious. Ice and snow do not present "a uniquely high likelihood of harm or severity of harm." *Lugo, supra* at 518-519. We hold that the trial court did not err when it granted defendant's motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello